

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

MAY -9 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

PETRONILO ALVARADO, JR.,

Appellant.

2 CA-CR 2006-0409

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20003859

Honorable Howard Hantman, Judge
Honorable Paul S. Banales, Judge Pro Tempore

AFFIRMED

Thomas F. Jacobs

Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Following a trial in his absence, a jury found appellant Petronilo Alvarado, Jr., guilty of aggravated assault, driving under the influence of an intoxicating liquor (DUI), driving with a blood alcohol concentration (BAC) of .10 or more, and multiple counts of

criminal damage and endangerment. The trial court sentenced him to concurrent, presumptive terms of imprisonment ranging from 1.5 to 7.5 years on four of the nine counts and to time served on the remaining five.¹ Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), raising no arguable issues but asking that we review the entire record for fundamental error. Alvarado has filed a supplemental brief. We affirm.

¶2 Viewed in the light most favorable to sustaining the convictions, *see State v. Newnom*, 208 Ariz. 507, ¶ 2, 95 P.3d 950, 950 (App. 2004), the evidence at trial showed that Alvarado caused a five-vehicle accident when he failed to avoid a car that was stalled in the roadway with its emergency lights flashing. The driver of a vehicle traveling in front of Alvarado just prior to the accident testified she had seen the emergency lights from approximately one-half mile away. She changed lanes to pass the stalled vehicle, but Alvarado apparently did not. He collided with the stalled vehicle, injuring its passenger and

¹The indictment contained ten charges, but the trial court granted Alvarado's motion for judgment of acquittal on count one. We note that as to count ten, driving with a BAC of .10 or more, although included in the court's sentencing minute entry, the court failed to orally pronounce judgment and sentence on that count at the sentencing hearing. "[I]n criminal matters, the judgment and sentence are complete, valid and appealable only when orally pronounced in open court *and* entered on the clerk's minutes." *State v. Glasscock*, 168 Ariz. 265, n.2, 812 P.2d 1083, 1085 n.2 (App. 1990); *see also State v. Johnson*, 108 Ariz. 116, 118, 493 P.2d 498, 500 (1972) (same); Ariz. R. Crim. P. 26.16(a) ("The judgment of conviction and the sentence thereon are complete and valid as of the time of their oral pronouncement in open court."). Our jurisdiction is strictly limited by statute, and under A.R.S. § 13-4033(A)(1), a defendant may only appeal from a judgment of conviction when it is "final." Thus, having no jurisdiction of Alvarado's conviction on count ten, we do not consider it on review. But we consider evidence of Alvarado's BAC as it relates to his DUI conviction.

setting off a chain reaction of additional collisions. The injured passenger, who had been standing outside the stalled vehicle just prior to impact, sustained cuts and scratches, and her ear was nearly severed. She testified she had looked for approaching traffic when she got out of the vehicle but “wasn’t worried” because the “few cars” she saw coming were “fairly far back.”

¶3 A victim from a different vehicle testified that, prior to the accident, Alvarado had been driving “fast,” “recklessly,” and “cutting in and out of traffic.” Another victim described Alvarado’s vehicle as “speeding” and “darting in and out” of traffic. A deputy sheriff who spoke with Alvarado at the accident scene testified he had “smell[ed] a strong odor of intoxicants” and that Alvarado’s speech had been slurred. Another deputy administered field sobriety tests and a horizontal gaze nystagmus (HGN) test to Alvarado at the scene. She testified Alvarado “had red, watery, bloodshot eyes”; “his face was flushed”; and “[h]e was stumbling, kind of staggering, swaying back and forth.” Alvarado exhibited six out of six possible “cues of impairment” on the HGN test, and he performed badly on, or was unable to complete, the field sobriety tests. After he was arrested and read his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), Alvarado admitted having drunk “a couple shots of peppermint schnapps.” Testing of blood drawn from Alvarado within two hours after the accident revealed an alcohol concentration of .149 percent.

¶4 Alvarado first asserts the trial court “committed reversible error” by failing to clearly, comprehensibly, and adequately answer the jury’s questions during deliberation. When a defendant fails to object to a jury instruction, or an answer to a jury’s question, “we

review only for fundamental error.” *State v. Garnica*, 209 Ariz. 96, ¶ 15, 98 P.3d 207, 210 (App. 2004). Fundamental error is that ““going to the foundation of the case, error that takes from the defendant a right essential to [the] defense, and error of such magnitude that the defendant could not possibly have received a fair trial.”” *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). In this case, Alvarado did not object to the answers the court gave to two of the three jury questions. He did object to at least one proposed answer to the third question; however, the basis for his objection was not clearly stated. Moreover, the record is unclear as to whether he actually agreed to the answer ultimately given. Alvarado had the responsibility of ensuring that an adequate record of his objections was made. *See State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983). In any event, we find no error, fundamental or otherwise, in the trial court’s answers to any of the questions.

¶5 “We review jury instructions in their entirety to determine if they accurately reflect the law.” *State v. Rios*, 217 Ariz. 249, ¶ 5, 172 P.3d 844, 845 (App. 2007). A “““trial judge should fully and fairly respond to all questions asked and requests made by deliberating jurors concerning the instructions and the evidence.””” *State v. Fernandez*, 216 Ariz. 545, ¶ 15, 169 P.3d 641, 647 (App. 2007), *quoting State v. Patterson*, 203 Ariz. 513, n.3, 56 P.3d 1097, 1099 n.3 (App. 2002), *quoting Arizona Supreme Court Committee on More Effective Use of Juries, Jurors: The Power of 12* at 118 (1994). Contrary to Alvarado’s assertions, the court’s answers to the jury’s questions were clear, complete, and legally sound.

¶6 The jury’s first question expressed confusion over differences in the trial court’s preliminary versus final instructions regarding the assault charge; the court directed the jury to apply the final instructions, which were based on the evidence presented at trial. The second question asked the court to define the word “imminent,” and the court told the jury to use the “ordinary and common meaning of the term.” In the third question, the jury asked: “What happens if we are able to agree on endangerment but we cannot agree on the degree of endangerment?” After discussion, the court and counsel agreed that the question probably indicated confusion as to how to determine the method by which Alvarado committed endangerment, if any endangerment had been committed. The court answered:

You should first consider if you can reach a unanimous decision as to whether any endangerment was committed by recklessly endangering another person with a substantial risk of imminent death. If you decide (unanimously) that it was not, or cannot decide it after reasonable efforts, then you go on to determine if any endangerment was committed by recklessly endangering another person with physical injury.²

The court did not err in giving any of these answers.

¶7 Next, Alvarado asserts the trial court erred by denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P., and that insufficient evidence was admitted to support his convictions, including the jury’s findings of the dangerous nature of the aggravated assault and one count of endangerment. We review the denial of a Rule 20 motion “for an abuse of discretion,” and we will reverse “only if there

²The jury had been instructed that “A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury” and had been given the definition of “recklessly.”

is ‘a complete absence of probative facts to support a conviction.’” *State v. Alvarez*, 210 Ariz. 24, ¶ 10, 107 P.3d 350, 353 (App. 2005), *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). “We review the sufficiency of evidence presented at trial only to determine if substantial evidence exists to support” the verdicts. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005). Substantial evidence is evidence that “reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.” *Id.*, *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997).

¶8 Alvarado has offered no argument in support of his assertions or identified any specific element of the various offenses that he believes was not proven. Therefore, we do not address each offense specifically. *See* Ariz. R. Crim. P. 31.13(c)(vi) (an appellate brief must include “[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on”). The evidence described above and the reasonable inferences therefrom, however, are sufficient to support all of Alvarado’s convictions.

¶9 Finally, Alvarado contends that the trial court erred by denying his motion in limine and admitting evidence that the passenger of the stalled vehicle had been three months pregnant at the time of the accident. “Trial courts have broad discretion in ruling on the admission of evidence.” *State v. Campoy*, 214 Ariz. 132, ¶ 5, 149 P.3d 756, 758 (App. 2006). We will reverse a conviction on appeal only upon finding “a clear, prejudicial abuse of discretion. The prejudice must be sufficient to create a reasonable doubt about

whether the verdict might have been different had the error not been committed.” *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994) (citation omitted). Alvarado argues the victim’s pregnancy was irrelevant, “[t]here was no complication in the pregnancy nor was there any injury to the unborn child,” and “[a]llowing this information to be introduced was highly prejudicial.” But even assuming the evidence was irrelevant, it was not unduly prejudicial, and no prejudice resulted. As Alvarado acknowledges, the jury heard evidence that there was no harm to the pregnancy or the unborn child, and the trial court specifically questioned the jurors during voir dire to determine they would not be biased by the fact of the victim’s pregnancy.

¶10 Pursuant to our obligation under *Anders*, we have reviewed the entire record for fundamental error. Finding none, we affirm Alvarado’s convictions and sentences over which we have jurisdiction.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge